MBF PROPERTY SERVICES SDN BHD & ANOR

v.

BALASUBRAMANIAM K ARUMUGAM

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
NH CHAN JCA
AHMAD FAIRUZ JCA
[CIVIL APPEAL NO: W-02-714-97]
25 JANUARY 2000

CONTRACT: *Construction of terms - Sale and purchase agreement - Loan agreement - Contemporaneous agreement absolving respondent from paying interest on loan until Certificate of Fitness issued - Whether agreements to be read as a whole - Proper effect*

The respondent had sought to purchase a certain property and had executed a sale and purchase agreement with a housing developer ('Kesturi Sakti') for the purpose. To finance the purchase, the respondent applied for and obtained a loan from the second appellant. *Inter alia*, the loan agreement stipulated that "interest on the loan shall be payable until the issuance of Certificate of Fitness". The facts showed however that, contemporaneous with the signing of the sale and purchase agreement, the respondent and the first appellant had also entered into an agreement whereby the first appellant undertook to pay all the interest accruing on the loan "until your loan is fully drawdown with the Certificate of Fitness being issued". The respondent contended that they need not have to make any payments to the second appellant until the issuance of the Certificate of Fitness, and applied for a declaration to that effect. The court below granted the application and the appellants appealed.

Held:
Per Gopal Sri Ram JCA

[1] The three documents, namely the sale and purchase agreement, the agreement with the first appellant and the loan agreement with the second appellant, must be read together as they form part of the same transaction.

[2] Read as a whole, the documents had the following effect: (i) the respondent shall purchase the property from the developer at a specified price and terms provided under the sale and purchase agreement; (ii) the first appellant shall keep the respondent indemnified and harmless in respect of any monetary payments due to the second appellant until

the Certificate of Fitness of Occupation is issued; and (iii) the second appellant will lend money to the respondent to pay for the purchase upon the mutual covenants contained in its letter of offer subject to the condition that interest will be paid by the first appellant during the relevant period.

[2] In the absence of language which denotes the presence of a contrary intention, it may be presumed that the parties used the term "Certificate of Fitness" as employed by the by-laws. The learned judge therefore committed no error in relying on the Building (Federal Territory of Kuala Lumpur) By-Laws 1985 to interpret the phrase "Certificate of Fitness", and ruling that it means a certificate which would entitle the respondent to occupy the subject property.

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Responden berhasrat membeli suatu hartanah dan untuk tujuan itu telah memeterai satu perjanjian jual beli dengan pemaju perumahan ('Kesturi Sakti'). Bagi membiayai pembelian tersebut, responden memohon dan memperoleh satu pinjaman dari perayu kedua. Perjanjian pinjaman berkenaan memperuntukkan, antara lain, bahawa "faedah ke atas pinjaman hendaklah dibayar sehingga Sijil Layak Menduduki dikeluarkan". Fakta menunjukkan bahawa, ketika menandatangani perjanjian jual beli dengan Kesturi Sakti, responden telah juga memeterai perjanjian dengan perayu pertama, di mana perayu pertama bersetuju untuk membayar segala faedah yang berbangkit dari pinjaman di atas "sehingga pinjaman anda dipakai sepenuhnya dengan Sijil Layak Menduduki dikeluarkan". Responden mengatakan bahawa ianya tidak perlu membuat apa-apa bayaran kepada perayu kedua sehinggalah Sijil Layak Menduduki dikeluarkan, dan memohon perisytiharan berhubungnya. Permohonan tersebut dibenarkan mahkamah di bawah dan perayu merayu.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Ketiga-tiga dokumen, iaitu perjanjian jual beli, perjanjian dengan perayu pertama dan perjanjian pinjaman dengan perayu kedua, hendaklah dibaca bersekali kerana mereka dimeterai dalam satu transaksi yang sama.

[2] Membacanya dokumen-dokumen di sini secara bersekali, kesan yang didapati adalah seperti berikut: (i) responden akan membeli hartanah dari pemaju pada harga dan dengan syarat seperti yang ditentukan dalam perjanjian jual beli; (ii) perayu pertama akan menjamin dan

menggantirugi responden berkaitan dengan segala bayaran yang kena di bayar kepada perayu kedua sehingga Sijil Layak Menduduki dikeluarkan; (iii) perayu kedua akan memberi pinjaman kepada responden untuk membeli hartanah terma yang terkandung dalam surat tawarannya tertakluk kepada syarat bahawa faedah akan dibayar oleh perayu pertama dalam tempoh yang relevan.

[3] Tanpa bahasa yang menunjukkan wujudnya niat yang berlawanan, ianya boleh diandaikan bahawa pihak-pihak menggunakan terma "Sijil Layak Menduduki" sepertimana ia digunakan oleh undang-undang kecil. Oleh yang demikian, hakim bijaksana tidak silap dalam bergantung kepada Undang-undang Kecil Bangunan (Wilayah Persekutuan Kuala Lumpur) 1985 bagi mentafsir perkataan "Sijil Layak menduduki", dan memutuskan bahawa ungkapan itu bermaksud sijil yang memberi hak kepada responden untuk menduduki hartanah berkenaan.

[Rayuan ditolak.]

Case(s) referred to:
IDC Group Ltd v. Clark [1992] 2 EGLR 184 ***(refd)***
Manks v. Whitely [1912] 1 Ch 735 ***(refd)***

For the appellants - Kelvin Kong; M/s Heng & Mogan
For the respondent - V Rajadevan (Joseph Mathews with him); M/s Rajadevan & Assoc

Reported by WA Sharif

JUDGMENT

Gopal Sri Ram JCA:

This appeal concerns the construction of an agreement entered into between the first appellant and the respondent. Briefly, the background against which this appeal rests is as follows.

On 23 July 1993, the respondent entered into a sale and purchase agreement with a housing developer called Kesturi Sakti Sdn. Bhd. to purchase a property. It was an agreement in the statutory form prescribed by the Housing Developers (Control & Licensing) Regulations 1989.

In order to finance the purchase of the property under the sale and purchase agreement, the respondent applied for and obtained a loan from the second appellant. In its letter of offer of a housing loan dated 25 August 1993 the second appellant inserted a provision which reads as follows:

Clause 8

Repayment: Interest on the loan shall be payable monthly until the issuance of Certificate of Fitness (CF). Upon the issuance of CF, repayment of this loan will be by 132 equal monthly instalments of principal and interest of Malaysian Ringgit RM 2,628.76, the first instalment to be made on the first day each month following next after the date of issuance of Certificate of Fitness (CF). However MBf Berhad reserve the right to effect the commencement of the monthly instalment of principal and interest at our absolute discretion from time to time.

This offer was accepted by the respondent on 2 September 1993. Contemporaneously with the signing of the sale and purchase agreement, the first appellant and the respondent entered into an agreement which is evidenced in an undated letter of the first appellant. Shorn of its formal parts, this is what it says:

We refer to your purchase of the above unit.

We are pleased to inform you that in consideration of you purchasing the said unit we agree to pay all the interest accrued on your loan disbursed to pay for the purchase price of the above unit during the period of construction of the unit and until your loan is fully drawdown with the Certificate Of Fitness being issued. The agreement to pay is not assignable by you and subject to you complying with the terms and conditions of your Loan Agreement with your end financier.

The payment of the interest will be made by us directly to your end financier with whom we shall be making arrangement to pay with your consent. Your end financier will keep you informed of the payment.

Please note that our agreement to pay interest is also subject to that the interest rate from your end financier for the loan must not be more than the prevailing rate of interest imposed by MBf Finance Berhad for this type of unit. If the interest rate of your loan is higher than the rate of MBf Finance Berhad, you will have to bear the difference of any excess.

Kindly signify your acceptance of our agreement to pay the interest and your consent to communication with your end financier.

This document is signed by the first appellant as the attorney for Kesturi Sakti Sdn. Bhd. It shows as having been copied to "End Financier" who in the present instance, counsel for the appellants concedes, is the second appellant.

Later, on 29 April 1997, the respondent took out an originating summons against the appellants, asking for a declaration that he need not make any payments to the second appellant until the issuance of the certificate of fitness for occupation. The learned judge granted an order in terms of that application.

Before us, Mr. Kelvin Kong for the appellant, submitted that the learned judge erred by failing to take account of cl. 8 of the second appellant's letter of offer. He argued that on a proper construction of the terms of the said letter, which was issued by the second appellant and accepted by the respondent, the second appellant reserved the right to call upon the respondent to commence repayment of the loan without taking into account the issuance of the certificate of fitness for occupation.

With respect, we cannot accept this submission. The three documents; the sale and purchase agreement, the agreement with the first appellant and the loan agreement with the second appellant, must be read together as they form part of the same transaction. This is in accordance with settled principles of law.

Thus, in *Manks v. Whitely* [1912] 1 Ch. 735, Fletcher Moulton LJ, said (at p. 754):

> [W]here several deeds form part of one transaction and are contemporaneously executed they have the same effect for all purposes such as are relevant to this case as if they were one deed. Each is executed on the faith of all the others being executed also and is intended to speak only as part of the one transaction, and if one is seeking to make equities apply to the parties they must be equities arising out of the transaction as a whole. It is not open to third parties to treat each one of them as a deed representing a separate and independent transaction for the purpose of claiming rights which would only accrue to them if the transaction represented by the selected deed was operative separately. *In other words, the principles of equity deal with the substance of' things, which in such a case is the whole transaction, and not with unrealities such as the hypothetical operation of one of the deeds by itself without the others.* (emphasis added)

When the three documents are read as a whole, their effect is this. In the first place, the respondent shall purchase the property from the developer at a specified price and terms provided under the sale and purchase agreement. Thereafter, the first appellant shall keep the respondent indemnified and harmless in respect of any monetary payments due to the second appellant until the certificate of fitness of occupation is issued. Secondly, the second appellant will lend money to the respondent to pay for the purchase upon the mutual covenants contained in its letter of offer subject to the condition that the interest will be paid by the first appellant during the relevant period.

Now it is quite clear that the undated letter of the first appellant provides no definition of the expression "Certificate of Fitness". It merely uses that term. The learned judge relied on the Building (Federal Territory of Kuala Lumpur) By-Laws 1985 as an aid to interpret the meaning of that phrase. "Certificate of Fitness" under the by-laws means a certificate which would entitle the respondent to occupy the subject property.

We are unable to disagree with the reasoning of the learned judge. In the absence of language which denotes the presence of a contrary intention, it may be presumed that the parties used the term "Certificate of Fitness" as employed the by-laws. Once this conclusion is reached, no fault may be placed upon the reasoning adopted by the learned judge. She merely construed the meaning according to well-settled canons of construction. (See, for example, Nourse LJ, in *IDC Group Ltd. v. Clark* [1992] 2 EGLR 184.) She did not commit any error. We are unanimous in our agreement with her judgment.

We would therefore dismiss the appeal. The appellants must pay the cost of this appeal. The order of the judge is affirmed. The deposit in court is to be paid to the respondent to account of his taxed costs.